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August 21, 2009

*Filed via RESS*

Ontario Energy Board  
2300 Yonge Street, F27  
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Attention: Ms. Kirsten Walli, Board Secretary

Dear Madam Secretary:

**Re: EB-2008-0411: GAPLO/CAEPLA's Written Argument**

Please find attached GAPLO/CAEPLA's written argument in the above noted matter.

Yours very truly,

**COHEN HIGHLEY LLP**

Paul Vogel

email: [vogel@cohenhighley.com](mailto:vogel@cohenhighley.com)

c.c. Parties to EB-2008-0411 via email

## ONTARIO ENERGY BOARD

IN THE MATTER OF The *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B, and in particular, s.43(1) thereof;

AND IN THE MATTER OF an Application by Union Gas Limited (“Union”) for an Order granting leave to sell 11.7 kilometres of 24 inch diameter steel natural gas pipeline running between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair.

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### **Written Argument of GAPLO-Union (Dawn Gateway) and the Canadian Association of Energy and Pipeline Landowner Associations (GAPLO/CAEPLA)** **August 21, 2009**

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## **TABLE OF CONTENTS**

|   |             |
|---|-------------|
| <b>A. INTRODUCTION</b>  | Pages 3-4   |
| <b>B. JURISDICTION</b>  | Pages 5-23  |
| EBLO 226/226-A – Union’s 1988 Application and the Board’s Decision        | Pages 7-10  |
| Union’s Present Application   | Pages 10-13 |
| Dawn Gateway Ownership/Operation  | Pages 13-16 |
| Law   | Pages 16-21 |
| Dawn Gateway Motivation   | Pages 21-23 |
| <b>C. PUBLIC INTEREST</b>   | Pages 24-34 |
| Union/Dawn Gateway Easement Rights  | Page 25     |
| Impacts Not Authorized  | Pages 26-27 |
| Impacts Not Assessed  | Pages 27-30 |
| Determination of Public Interest  | Pages 30-34 |
| <b>D. JURISDICTIONAL CHANGE IMPACTS</b>                                   | Pages 35-53 |
| Land Use Restrictions under the NEB Act and Pipeline Crossing Regulations | Pages 35-44 |
| Increased Risk of Exposure to Abandonment Liabilities and Costs           | Pages 44-50 |
| Loss of Availability of Costs Recovery for Regulatory Proceedings         | Pages 50-53 |
| <b>E. ADDRESSING UNION’S FAILURE TO IDENTIFY AND ASSESS IMPACTS</b>       | Pages 54-62 |
| Land Use Restrictions under the NEB Act and Pipeline Crossing Regulations | Pages 54-58 |
| Increased Risk of Exposure to Abandonment Liabilities and Costs           | Pages 58-60 |
| Loss of Availability of Costs Recovery for Regulatory Proceedings         | Page 60     |
| Conditions of Approval  | Pages 60-62 |
| <b>SCHEDULE 1 – Proposed Conditions of Approval</b>                       | Pages 64-66 |

## A. INTRODUCTION

1. The Board's finding in its Issues Decision and Order dated April 6, 2009 in this proceeding is that:

“The St. Clair Line is currently under OEB jurisdiction and is considered integral to Union Gas's transmission and distribution provincial pipeline system”.<sup>1</sup>

That was the Board's determination in 1988 when it decided that the St. Clair Line was then in the provincial and not the federal jurisdiction<sup>2</sup>, and that remains the St. Clair Line's current regulatory status.

2. As noted in its Issues Decision, it was the Board on Union's leave to construct application “that determined that the construction and operation of the St. Clair pipeline [within provincial jurisdiction] is in the public interest, taking into consideration landowner impacts”<sup>3</sup>. That is, that the impacts of Union's construction and operation of the St. Clair Line within provincial jurisdiction had been satisfactorily mitigated or compensated<sup>4</sup>.

3. However, with respect to Union's present application, the Board in 1988 did not consider and did not determine whether additional impacts on landowner interests which would result now from the proposed transfer of the St. Clair Line to federal jurisdiction were addressed. As the Board says in its Issues Decision on this application, it is for the Ontario Energy Board on

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<sup>1</sup> GAPLO Authorities, Tab 1- Issues Decision and Order, April 6, 2009, p. 4.

<sup>2</sup> GAPLO Authorities, Tab 2 - EBLO 226/226-A, Decision With Reasons.

<sup>3</sup> Issues Decision and Order, April 6, 2009, *supra* at p. 4.

<sup>4</sup> EBLO 226/226-A, Decision With Reasons, *supra* at para. 3.4.12.

this application and not the National Energy Board to determine whether those changes and resulting landowner impacts “are in the public interest of Ontario and Ontario landowners”.<sup>5</sup>

4. GAPLO/CAEPLA submits that there are two principal issues to be determined in this proceeding:

- Firstly, whether Union has satisfied the Board that there will be any material change in the use and operation of the St. Clair Line under Union’s Dawn Gateway proposal so as to eliminate it as integral to Union’s provincial system and justify its approval for sale and transfer to the federal jurisdiction. In this regard, Union has been clear on this application that if the St. Clair Line is not transferred to the federal jurisdiction, the proposed sale of the St. Clair Line as part of Dawn Gateway will not proceed and no approval from the Board is therefore required;
- Secondly, even if the Board should determine that the St. Clair Line should be operated in the federal jurisdiction as part of Dawn Gateway, whether approval of the sale for that purpose is in the public interest considering:
  - i) The negative impacts on landowner interests which will result from the proposed jurisdiction transfer; and
  - ii) Union’s failure on this application to provide any evidence that it has undertaken appropriate consultation with landowners to address these impacts or to propose reasonable measures to mitigate or compensate landowners satisfactorily for these impacts.

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<sup>5</sup> Issues Decision and Order, April 6, 2009, *supra* at p.5.

## B. JURISDICTION

5. Upon Union's 1988 application for leave to construct and operate the St. Clair Line in EBLO 226/226-A, the Board determined:

“The primary constitutional characteristic of the proposed line is as a part of the Union distribution system, not as an ‘integral’ part of the short international line”<sup>6</sup> and

“The St. Clair-Bickford Line should be accepted as a component of the distribution system of Union, with or without the international link.”<sup>7</sup>

6. Union has agreed on this present application that the purpose of the St. Clair Line as proposed by Union in 1988 and approved by the Board at that time, and “as constructed and placed in service in 1989, was to provide a source of gas to [Union's] distribution system.”<sup>8</sup> The proposed use and benefits of the St. Clair Line identified by Union in 1988 included interconnection to American pipeline facilities; access to additional supplies from U.S. sources; and providing access to additional underground storage facilities.<sup>9</sup>

7. Accordingly, the St. Clair Line approved by the Board for operation within the provincial jurisdiction was the same St. Clair to Bickford line then proposed by Union to provide a source of gas for its distribution system along with those stated proposed uses and benefits and, as acknowledged by Union, the St. Clair Line “has provided [those anticipated] benefits.”<sup>10</sup>

8. The jurisdictional issue in this proceeding (Board Issues 1.1 and 1.2) is whether, in the event the proposed sale of the St. Clair Line to Dawn Gateway is approved and ultimately

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<sup>6</sup> EBLO 226/226A, Decision With Reasons, *supra* at para. 3.8.73.

<sup>7</sup> *Ibid.* at para. 3.8.67.

<sup>8</sup> Exhibit K 1.7, Union's response to Board staff interrogatory #4 (ii), (iii), p. 3.

<sup>9</sup> *Ibid.* at p.2.

<sup>10</sup> *Ibid.* at p.3.

completed, the St. Clair Line should continue to operate in the jurisdiction of the Ontario Energy Board or whether it should fall under the jurisdiction of the National Energy Board.

9. As expressed by Union in an interrogatory response, the constitutional test to be applied in determining the answer to that question is:

“... whether the ... pipelines are being operated in common as a single enterprise providing international service on a continuous and regular basis”.<sup>11</sup>

10. This constitutional test is derived from the Supreme Court of Canada’s 1998 decision in *Westcoast Energy Inc. v. Canada (National Energy Board)*<sup>12</sup> (“**Westcoast**”) which describes a two-part test for determination of whether pipeline facilities are in the provincial or federal jurisdiction. In *Westcoast*, the issue considered by the Court was whether Westcoast’s processing facilities in B.C. were part of its federally regulated interprovincial pipeline system supplying and transporting product from the processing facilities.

11. In determining that the processing facilities were in the federal jurisdiction, the Court stated:

“In order for several operations to be considered a single federal undertaking for the purposes of s.92(10)(a), they must be functionally integrated and subject to common management, control and direction. Professor Hogg states, at p.22-10, that ‘[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not.’ He adds, at page 22-11, that the various operations will form a single undertaking if they are ‘actually operated in common as a single enterprise.’ In other words, common ownership must be coupled with functional integration and common management. A physical connection

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<sup>11</sup> Exhibit K 1.7, Union response to Board staff interrogatory #1, p. 4.

<sup>12</sup> GAPLO Authorities, Tab 3 – *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, 1998 CarswellNat 266.

must be coupled with an operational connection. A close commercial relationship is insufficient.”<sup>13</sup>

12. In view of this Board’s 1988 determination that the St. Clair Line is in the provincial and not the federal jurisdiction, the jurisdictional issue in this proceeding must be decided on the basis of a determination by this Board as to whether there is any change now proposed by Union in the operation of the St. Clair Line in conjunction with the Belle River Mills line, St. Clair River Crossing and the new Bickford to Dawn line (substituting under Dawn Gateway for the Bickford Storage Pool line) which would alter “the primary constitutional characteristic” of the St. Clair Line as part of Union’s distribution system to become instead an “integral” part of the international link.

#### **EBLO 226/226-A – Union’s 1988 Application and the Board’s Decision**

13. The basis for the Board’s approval of the St. Clair Line as constructed in 1989 and operated to the present time is found in Union’s 1988 application and pre-filed evidence in EBLO 226/226-A. As acknowledged by Union in the above referenced interrogatory response on this application, the primary purpose of the St. Clair Line was to allow Union “increased access to supplies of U.S. competitively priced gas; [and] access to existing and potential Michigan underground gas storage.”<sup>14</sup>

14. The St. Clair-Bickford line was to interconnect with the facilities of St. Clair Pipelines and MichCon.<sup>15</sup> Since both Union and St. Clair Pipelines at that time were subsidiaries of UnicorpCanada Corporation (“**Unicorp**”), all of the Canadian facilities were under the common

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<sup>13</sup> *Westcoast, supra* at para. 49.

<sup>14</sup> Exhibit K 1.9, GAPLO Pre-filed Evidence, GAPLO Evidence Statement, Attachment 1 – EBLO 226/226A application, p. 2, par. 3; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 116, l. 8-13.

<sup>15</sup> Exhibit K1.9, GAPLO Pre-filed Evidence, GAPLO Evidence Statement, Attachment 1 – EBLO 226/226A Pre-filed Evidence, p. 1, par. 2; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p.116, l. 21-26.



ownership of Unincorp. Union always contemplated that the St. Clair Pipelines facilities (the river crossing) would be separately regulated by the NEB and that MichCon, a separate corporate entity, would be responsible for regulation of the American facilities.<sup>16</sup>

15. At that time, and as currently operated, it is the Bickford Storage Pool line which transports the gas delivered by the St. Clair Line from Bickford to Dawn. However, even in 1988 it was understood that “use of the Bickford Line may be restricted during periods of injection or withdrawal of volumes from the Bickford or Terminus Storage Pools”<sup>17</sup>. In fact, Union’s 1988 application itself contemplates that “additional pipeline capacity from the Bickford and Terminus Storage Pools would be proposed as storage and transportation needs materialized.”<sup>18</sup>

16. From the Board’s 1988 Reasons for Decision in EBLO 226/226-A, it appears that Union’s own position on the constitutional issue at that time was that:

“Unless the proposed pipeline, located entirely in Ontario, is a work which will connect Ontario to another province or country, it is not a pipeline within the meaning of the *NEB Act* and does not fall within NEB jurisdiction.”<sup>19</sup>

It was on this basis that Union requested the Board to approve the construction and operation of the St. Clair Line within provincial jurisdiction, with Union’s assurance that “the proposed pipeline will be an integral part of Union’s system”<sup>20</sup> and that the evidence advanced by Union in that case identifying “what Union’s system is at present and what it will be should the proposed

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<sup>16</sup> EBLO 226/226A Pre-filed Evidence, *supra* at page 5, par. 16; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 117, l.11-23.

<sup>17</sup> EBLO 226/226A Pre-filed Evidence, *supra* at page 5, par. 16; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 118, l.22 to p.119, l.1.

<sup>18</sup> EBLO 226/226A Pre-filed Evidence, *supra* at page 7, par. 20; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 119, l.2-14.

<sup>19</sup> GAPLO Authorities, Tab 2 - EBLO 226/226A, Decision with Reasons, para. 3.8.13.

<sup>20</sup> *Ibid.* at para. 3.8.13.

pipeline be constructed” should be accepted by the Board as the basis for its approval of the St. Clair Line.<sup>21</sup>

17. On that evidence, the constitutional facts with respect to the St. Clair Line as determined by the Board in 1988 are that:

- (a) The St. Clair line lies entirely within Ontario and “is fundamentally designed to be, and will be, an important part of the Union distribution system in Ontario. It is an intra-provincial work”<sup>22</sup>;
- (b) “The St. Clair-Bickford line should be accepted as a component of the distribution of Union, with or without the international link”<sup>23</sup>;
- (c) The Board “has regulatory jurisdiction over the economic viability and performance of Union”, a significant component of which is the connection to Michigan Storage.<sup>24</sup>
- (d) “The St. Clair-Bickford line is integrated with Union’s Ontario system, and is of no national significance or jurisdiction.”<sup>25</sup>
- (e) “Neither the international link nor the St. Clair-Bickford line will be operated by, or form part of ... a truly Canadian gas transportation system.”<sup>26</sup>
- (f) Through the St. Clair River Crossing, “the NEB will control gas exports out of Canada and gas imports in to Canada.”<sup>27</sup>

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<sup>21</sup> *Ibid.* at para. 3.8.21.

<sup>22</sup> *Ibid.* at para. 3.8.64.

<sup>23</sup> *Ibid.* at para. 3.8.67.

<sup>24</sup> *Ibid.* at para. 3.8.74.

<sup>25</sup> *Ibid.* at para. 3.8.75.

<sup>26</sup> *Ibid.* at para. 3.8.78.

- (g) “The fact that the St. Clair-Bickford Line’s financial viability may be presently dependent on an international connection does not ... justify removing the OEB’s jurisdiction over a local system, its storage, its supply and its distribution, as long as the NEB has control over the short international connecting link.”<sup>28</sup>
- (h) Extending the NEB’s jurisdiction east of the St. Clair River Valve Site “will cause serious and unnecessary economic, legal, political and jurisdictional problems”. It would “encroach on the established right of provincial jurisdiction over local distribution systems.”<sup>29</sup>

18. On the basis of these constitutional facts determined by this Board in 1988, the St. Clair Line as constructed in 1989 and operated currently is clearly within provincial jurisdiction.

### **Union’s Present Application**

19. Under Union’s Dawn Gateway proposal in the present application, Union will continue to use the St. Clair Line “to provide its customers with transportation service for natural gas from the St. Clair River border crossing to Union’s Dawn Hub.”<sup>30</sup> As in the past, the principal purpose of the St. Clair Line will continue to be to “increase the ability of Ontario customers to access gas storage and gas supply in the U.S.”<sup>31</sup>

20. The new Bickford to Dawn line has been included in Union’s Dawn Gateway proposal because it is the “capacity constraint” on the current Bickford Storage Pool line which is

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<sup>27</sup> *Ibid.* at para. 3.8.79.

<sup>28</sup> *Ibid.* at para. 3.8.81.

<sup>29</sup> *Ibid.* at para. 3.8.83.

<sup>30</sup> Exhibit K1.6 – Union’s application, p. 2, para. 7; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 119, l.27 to p.120, l. 4.

<sup>31</sup> Union’s application, *supra* at p. 2, para. 10; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 120, l.7-15.

presently limiting the ability of Ontario customers to access U.S. storage and supply.<sup>32</sup> This “capacity constraint” is the restriction anticipated in Union’s 1988 application which results during periods of injection or withdrawal from the Bickford and Terminus Storage Pools.<sup>33</sup>

21. Accordingly, a new Bickford to Dawn line is included in the Dawn Gateway proposal to substitute for the Bickford Storage Pool line and provide the additional capacity which it was contemplated in 1988 would be required in the future. This “additional pipeline capacity” is required to service the storage and transportation needs anticipated at that time which have now “materialized”<sup>34</sup>.

22. In summary, what Union now proposes as the Dawn Gateway Line has the same purpose and is to provide the same benefits as proposed by Union in 1988 and achieved by the St. Clair Line since that time – a source of gas to Union’s distribution system through interconnection to American facilities to access additional supplies and storage. Under Union’s Dawn Gateway proposal, there will be no change in the function of the St. Clair Line. The proposed expansion in capacity between Bickford and Dawn by substituting the new Bickford to Dawn line for the Bickford Storage Pool line is simply providing the additional capacity which was anticipated in 1988 because additional storage and transportation needs have “materialized”.

23. In fact, since 1988, Union has brought two applications to this Board which have similarly purported to justify additional facilities from Bickford to Dawn for provincial regulation to address the same “capacity constraint” on the Bickford Storage Pool line.<sup>35</sup>

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<sup>32</sup> Exhibit K1.6 – Union’s Pre-filed Evidence, p. 6, para. 31.

<sup>33</sup> Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 121, 1.3-8.

<sup>34</sup> Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 121, 1.9-18.

<sup>35</sup> Union response to Undertakings J2.4 (Decision in EBLO 244) and J2.5 (Application RP- 1999- 0030).

24. Further, taking into consideration Union's recently approved Heritage Pool application<sup>36</sup>, the case for provincial regulation of the St. Clair Line is, if anything, stronger now than it has been from 1988 to date.

25. Union's Heritage Pool application was for designation of a new storage pool and approval of certain facilities including certain new gathering and transmission facilities. In Schedule B to Union's Heritage Pool application, the new transmission facilities are shown as connecting at a "Union Gas Interconnection" which is the St. Clair Line Station.<sup>37</sup> The St. Clair Line Station is part of Union's St. Clair Line and is being retained by Union and not transferred as part of Dawn Gateway because it contains equipment "that Union will continue to own and use for the operation of other parts of the Union system"<sup>38</sup>.

26. With the Heritage Pool transmission line connection at the St. Clair Line Station, the St. Clair Line, in addition to transporting Michigan storage gas, is now available to transport storage gas from Union's Heritage Pool to the Bickford Pool Compressor Station for transportation to Dawn through the current Bickford Storage Pool line or, under Union's Dawn Gateway proposal, through the new Bickford to Dawn line.<sup>39</sup>

27. In either case, upon completion of Union's Heritage Pool facilities, the St. Clair Line will be available to service Union's provincial storage operations for the transportation of Ontario storage gas to Dawn for Union's provincial distribution system. This capability of the St. Clair Line to service Union's provincial storage operations as an additional source of gas for its

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<sup>36</sup> EB-2008-0405, approved by OEB Decision With Reasons, issued May 29, 2009.

<sup>37</sup> Exhibit K1.10, Heritage Pool Notice of Application, Schedule B and Pre-filed Evidence excerpts p. 1, para. 2(e); testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at p. 126, l.22 to p.127, l.6.

<sup>38</sup> Exhibit K 1.6, Union Pre-filed Evidence, p.3, para. 18.

<sup>39</sup> Testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at p. 127 l. 24 to p. 128 l.1 and p. 129 l.27 to p. 130, l.3.

provincial distribution system further reinforces the constitutional facts with respect to the St. Clair Line as determined by this Board in 1988.

28. The St. Clair Line has been and will continue to be a part of Union's distribution system – it is not an integral part of the short connecting international line.

### **Dawn Gateway Ownership/Operation**

29. Union asserts that the new constitutional fact now constituting the St. Clair Line a federal work or undertaking under NEB jurisdiction is that “the Dawn Gateway Line will operate as one international pipeline offering seamless service between the U.S. and Canada on a regular basis.”<sup>40</sup> Union acknowledges that “while ownership is relevant it is not determinative.”<sup>41</sup>

30. As expressed by the Supreme Court of Canada in the *Westcoast* reference above, the constitutional test is whether the operations of the St. Clair Line are functionally integrated with the international undertaking and subject to common management, control and direction – are they actually to be operated in common as a single enterprise? Comparing the proposed ownership and operation of the St. Clair Line as part of the Dawn Gateway proposal to its ownership and operation from 1988 to date which the Board has already determined is in the provincial jurisdiction:

(a) From 1988 to date:

- The Canadian facilities have been owned by Union and St. Clair Pipelines, formerly subsidiaries of UnicorpCanada and now subsidiaries of Spectra. The American facilities have been owned by MichCon, a subsidiary of DTE;

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<sup>40</sup> Exhibit K1.7, Union response to Board staff interrogatory No. 1, p. 3; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 112, 1.6-14.

<sup>41</sup> *Ibid.* at p.4.

- These facilities were constructed and have operated “as a single system”<sup>42</sup>, also described as “a contiguous pipeline system”<sup>43</sup>;
- The Canadian facilities were constructed and have been operated and maintained by Union;<sup>44</sup>
- The U.S. facilities were constructed and have been operated and maintained by MichCon.<sup>45</sup>

(b) Under Union’s Dawn Gateway proposal:

- Both the Canadian and American facilities will continue to be owned by separate corporate entities, the Canadian facilities by Dawn Gateway LP and the American facilities by Dawn Gateway LLC;<sup>46</sup>
- Union will continue to own both the St. Clair Line Station and the Dawn Compressor Station; MichCon will continue to own the Michigan storage facility<sup>47</sup>;
- Union has responsibility for pre-development services with respect to the Canadian facilities including negotiation of agreements, regulatory approvals, landowner consultation and engineering design<sup>48</sup>;
- Union is responsible for integrity management services on the Canadian facilities including “putting structures and controls around the key processes

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<sup>42</sup> Exhibit K2.6, Union response to GAPLO Interrogatory No. 2, Attachment 1, Construction Agreement May 1, 1988, p.23, para.6; Operating Agreement May 1,1988, p.39, para.1.

<sup>43</sup> Operating Agreement May 1, 1988, *supra* at p.38; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 134, l.1-4.

<sup>44</sup> Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 133, l.24-28.

<sup>45</sup> Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 131, l.15-21 and p.133, l.7- 11.

<sup>46</sup> Exhibit K 1.6, Union Pre-filed Evidence, p.1, paras. 6,7; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 134, l.11-21.

<sup>47</sup> Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 134 l.22-27.

<sup>48</sup> Exhibit K1.7, Union response to Board staff Interrogatory No. 1, p.2; testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 134, l. 28 to p.135, l.13.

that are used to operate and maintain the pipelines”<sup>49</sup> and accordingly will determine, at least in part, how the Canadian facilities are operated and maintained<sup>50</sup>;

- Union is also to have responsibility for land management and landowner relation services in connection with the Canadian facilities<sup>51</sup>;
- DTE will be responsible for these operational responsibilities in connection with the American facilities<sup>52</sup>;
- Union is not a subsidiary of and has no corporate relationship with DTE apart from its commercial relationship maintained with MichCon from 1988 to date and proposed to continue under Dawn Gateway with DTE to coordinate operation of Canadian and American facilities<sup>53</sup>.

31. In its 1988 Reasons for Decision, the Board expressly considered and rejected the position advanced by TransCanada Pipeline Limited (“TCPL”) that the St. Clair Line “is part of a larger undertaking that goes beyond Ontario and Union’s primary goals to access storage and alternate supply.”<sup>54</sup>

32. Today, in addition to there being no change in the purpose or function of the St. Clair Line under the Dawn Gateway proposal (apart from its use to transport Ontario storage gas), there is no material change now advanced by Union in connection with its Dawn Gateway proposal with respect to the ownership and operation of the St. Clair Line which would alter “the primary constitutional characteristic” of the St. Clair Line as part of Union’s provincial

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<sup>49</sup> Union response to GAPLO Interrogatory No. 5(b) and (c), *supra* at pp. 2, 3; testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at p. 235, l.14-24.

<sup>50</sup> Testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at p. 135, l.25 to p.136, l.8.

<sup>51</sup> Union response to GAPLO Interrogatory No. 5(k), *supra* at page 3; testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at p. 136, l.10- 14.

<sup>52</sup> Testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at p. 136, l.15-22.

<sup>53</sup> Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 136, l.24-28.

<sup>54</sup> EBLO 226/226A, Decision with Reasons, *supra* at para. 3.8.3



distribution system. The Canadian and American facilities will continue to be owned and operated by different corporate entities – Dawn Gateway LP and Union (at least in significant part) in Canada, and Dawn Gateway LLC and DTE in the U.S.

### **Law**

33. For the same reasons and on the basis of the same constitutional facts as determined by the Board in 1988, Union’s application should be dismissed.

34. This Board’s 1988 determination that the St. Clair Line is within provincial jurisdiction has been considered and commented on by the NEB. In its 1993 decision in *Altamont Gas Transmission Canada Ltd. (GHW-1-92)*, the NEB majority decision held that 217 km of pipeline to be constructed and operated by NOVA in Alberta together with a 300 metre border crossing owned by Altamont constituted a single pipeline in the federal jurisdiction for the purpose of exporting gas to the U.S. Different than Union’s Dawn Gateway proposal, the NOVA and Altamont lines were for gas export and did not provide gas for provincial distribution.

35. In a dissenting opinion, the NEB makes reference to the OEB’s 1988 decision with respect to the St. Clair-Bickford line:

“... The Board has previously approved the construction of and currently regulates a number of short pipelines which act as “bridges” between pipelines regulated by other authorities. Altamont Canada provided the Board with a list of 17 bridge gas pipelines which the Board approved and currently regulates ...

“The Board approved the construction of the St. Clair line and currently regulates that line. The Ontario Energy Board approved the St. Clair-Bickford line and currently regulates that line. The Ontario Energy Board determined, notwithstanding the objection of TransCanada Pipelines, that the St. Clair-Bickford line was under provincial jurisdiction. TransCanada Pipelines sought leave

to appeal the OEB decision. The NEB, in hearing St. Clair's application, had declined to deal with the jurisdictional issue TransCanada Pipelines had raised because at that point, the OEB had ruled on the matter and TransCanada Pipelines was seeking leave to appeal. The Ontario Divisional Court dismissed TransCanada Pipelines' application for leave to appeal. The court provided brief reasons by way of written endorsement on the record. The court stated that the reasoning of the Supreme Court of Canada in *Kootenay and Elk Railway Company v. Burlington Northern Inc.* ("*Kootenay*") was dispositive of the issue ...

"The Board has never raised a question with respect to the constitutional classification of the St. Clair-Bickford line."<sup>55</sup>

36. *Kootenay and Elk Railway v. CPR* ("***Kootenay***") is a 1972 decision of the Supreme Court of Canada. In that case, Burlington (a U.S. company) constructed a short line to the U.S.-Canada border and Kootenay (a B.C. provincial company) proposed to construct a line to the junction point with the Burlington line just north of the border. Burlington was to own and operate facilities south of the border and Kootenay was to own and operate facilities north of the border.

37. Mr. Justice Martland (for the majority) considered the jurisdictional issue and concluded that the Canadian Transport Commission was correct in determining that the Kootenay line was not part of an extra-provincial undertaking. In coming to this conclusion, Mr. Justice Martland notes:

"[Kootenay] is not a subsidiary of Burlington or subject to Burlington's control. Its railway would not be operated by Burlington. Its proposed function is to deliver carloads of coal over its line to Burlington, north of the border [for extra-provincial transport by Burlington as its only purpose] ...

"... Kootenay Railway would not connect the province of British Columbia and any other province, nor would it extend beyond the limits of the province ...

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<sup>55</sup> GAPLO Authorities, Tab 4 – *Altamont Gas Transmission Canada Ltd. (GHW-1-92)*, pp. 27-28.

“ ... That undertaking is one which is to be carried on entirely within the province [even though] its undertaking when coupled with that of Burlington would provide a means of transport of goods from British Columbia into the United States.”<sup>56</sup>

38. In connection with Union’s Dawn Gateway proposal advanced on this application, there is no material change in the constitutional facts as determined by the Board in 1988 and, as expressed by the Divisional Court, the Supreme Court of Canada decision in *Kootenay* continues to be dispositive of the jurisdictional issue.

39. As in *Kootenay*:

- Union is not a subsidiary of DTE or subject to DTE’s control;
- Union will continue to have significant responsibility for the proposed operation of the St. Clair Line;
- As constructed and operated by Union since 1988, and as proposed by Union as part of Dawn Gateway, the function of the St. Clair Line has been and will continue to be to transport Michigan storage gas to (as well as Ontario storage gas within) Ontario. The Board has already determined that this function is as part of Union’s distribution system and not as an integral part of the short international line. This determination applies equally to the proposed new Bickford to Dawn line;
- The St. Clair Line does not connect Ontario with another province or extend beyond the limits of the province; and
- The St. Clair line will continue to operate entirely within the province even though it provides a means for transportation of Michigan storage gas into Ontario.

40. In *Westcoast*, the Supreme Court of Canada described the two-part test for determination of whether pipeline facilities are in the federal jurisdiction as follows:

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<sup>56</sup> GAPLO Authorities, Tab 5 – *Kootenay & Elk Railway v. Canadian Pacific Railway*, [1974] S.C.R. 955, 1972 CarswellNat 432 at paras. 59-61.

“It is well settled that the proposed facilities may come within federal jurisdiction under s.92(10)(a) in one of two ways. First, they are subject to federal jurisdiction if the Westcoast mainline transmission pipeline, gathering pipelines and processing plants, including the proposed facilities, together constitute a single federal work or undertaking. Second, if the proposed facilities do not form part of a single federal work or undertaking, they come within federal jurisdiction if they are integral to the main line transmission pipeline.”<sup>57</sup>

41. For the St. Clair Line to come within federal jurisdiction, it must either constitute a single work or undertaking with or be integral to the international facilities. In discussing the first part of the test in *Westcoast* (i.e. whether the facilities in question constitute a single work or undertaking), the Court said:

“The cases grouped under what has become known as the first test in *Central Western, supra*, demonstrate that whether a single federal undertaking exists for the purposes of s.92(10)(a) depends on a number of factors. It is clear that the mere fact that a local work or undertaking is physically connected to an interprovincial undertaking is insufficient to render the former a part of the latter ... the fact that both operations are owned by the same entity is also insufficient. In *AGT, supra*, Dixon C.J. stated at page 263 that “[t]his court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved” and, at page 265, that “[ownership] itself is not conclusive.” A single entity may own more than one undertaking.”<sup>58</sup>

42. Applying this first test in *Westcoast*, it is clear that the St. Clair line is not itself an interprovincial or extra-provincial work being entirely located in Ontario. Neither does it form part of a single undertaking since the Canadian facilities are owned and operated by separate corporate entities, Dawn Gateway LP and Union in Canada and Dawn Gateway LLC and DTE in the U.S. As noted in Union’s argument, “[e]ven though there would only be one toll, shippers

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<sup>57</sup> *Westcoast, supra* at para. 45.

<sup>58</sup> *Westcoast, supra* at para. 48.

will enter two contracts, one for the portion of the Dawn Gateway Pipeline in the US and another for the Canadian portion of the Dawn Gateway Pipeline.”<sup>59</sup>

43. That both Dawn Gateway LP and Dawn Gateway LLC are jointly owned by Spectra and DTE through affiliates, and that the St. Clair crossing is physically connected to the St. Clair line, evidence only a close commercial relationship. As identified by Board Staff in argument, “[t]here is no common beneficial ownership in either Spectra or DTE. Common ownership is attributed to one entity, DGLP, but the members of the DGLP are not subsidiaries or related entities of each other.”<sup>60</sup> Despite the proposed change in “commercial costume” under Dawn Gateway, the reality is that this same relationship has existed between these corporate entities or their subsidiaries since 1988 and is “insufficient” to render the St. Clair Line part of a single undertaking so as to bring it within federal jurisdiction (as with the other 17 bridge connections to which the NEB refers in *Altamont*).

44. Where facilities connecting to “bridge” pipelines have been determined to be in the federal jurisdiction, it is because they have been owned and operated by the same party. In *Westcoast*, Westcoast owned and operated the gathering lines, processing and transmission facilities. In the NEB’s recent determination that TCPL’s Alberta system is part of TCPL’s interprovincial undertaking, or alternatively essential to the combined TCPL undertaking, TCPL owns and operates both the formerly provincial and the interprovincial facilities<sup>61</sup>.

45. Similarly, applying the second test in *Westcoast* (i.e. whether the St. Clair Line is integral to the international facilities), this Board has already determined in 1988 as a constitutional fact

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<sup>59</sup> Argument in Chief of Union Gas Limited at p.5, para. 12.

<sup>60</sup> Board Staff Submission at p.6, para.19.

<sup>61</sup> NEB Proceeding GH-5-2008.

that “the St. Clair-Bickford line should be accepted as a component of the distribution system of Union, with or without the international link.”<sup>62</sup> The Board expressly found that “the primary constitutional characteristic of the proposed line is as part of the Union distribution system, not as an ‘integral’ part of the short international line”.

46. Accordingly, with respect to application of the second test in *Westcoast*, the issue has already been decided – the St. Clair Line is not an integral part of the extra-provincial pipeline – and no material change is now proposed by Union as part of the Dawn Gateway proposal which would justify any other determination of that constitutional fact.

### **Dawn Gateway Motivation**

47. Union has been clear on this application that its principal motivation in proposing the Dawn Gateway Line and the transfer of the St. Clair Line to the federal jurisdiction is to obtain the commercial advantage of negotiated rates not available under the OEB’s jurisdiction. Union has stated that Dawn Gateway will not proceed “if it is ultimately determined that the Dawn Gateway Line is under the jurisdiction of the OEB” and will only proceed “with the Canadian portion being subject to NEB regulation as a Group 2 pipeline”<sup>63</sup>; “Union is not interested in participating as a partner in Dawn Gateway at cost of service rates”<sup>64</sup>; and, “this project will only proceed as a NEB Group 2 regulated company with negotiated rates.”<sup>65</sup>

48. Under cross-examination, Steve Baker (a vice-president of Union Gas Limited and co-president of Dawn Gateway LP’s general partner, Dawn Gateway Pipeline General Partner Inc.) testified:

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<sup>62</sup> EBLO 226/226A, Decision with Reasons, *supra* at para. 3.8.67.

<sup>63</sup> Union response to Board staff Interrogatory No.1, *supra* at p. 2.

<sup>64</sup> Union response to Board staff Interrogatory No. 6 (1), *supra* at p. 1.

<sup>65</sup> Union response to Board staff Interrogatory No.7 (3), *supra* at p. 2.

“Mr. Vogel: ... what Union is telling the Board on this application is that Union itself, or its joint venture partners, do not wish to proceed with Dawn Gateway unless it has available to it negotiated rates as a Group 2 company under the NEB jurisdiction, and neither Union or its joint venture partners are interested in proceeding with this project as an OEB-regulated entity; is that correct?”<sup>66</sup>

Mr. Baker: Yes.”<sup>66</sup>

49. But for the commercial advantage to be gained, Dawn Gateway will not proceed and Union will continue to operate the St. Clair Line in the provincial jurisdiction. In fact, in recent submissions responding to the Board’s proposal that it might consider alternative regulatory treatment of the Dawn Gateway Line in the provincial jurisdiction, Union has expressly acknowledged that if a different provincial regulatory approach permitting negotiated rates were available, it might be possible “to structure the project in a way that meets customers’ needs, satisfies the investors risk/return requirements, and maintains OEB jurisdiction over some assets.”<sup>67</sup> Clearly, but for the attraction of negotiated rates, Dawn Gateway could be accommodated within the provincial jurisdiction and Union would not be proposing the transfer of the St. Clair Line to federal jurisdiction.

50. However, the maximization of commercial advantage perceived by Union and Dawn Gateway is constitutionally irrelevant and immaterial to this Board’s determination as to whether the St. Clair Line should continue to be regulated provincially. So too is Union’s emphasis on the current under-utilization of the St. Clair Line and resulting operating loss irrelevant to the Line’s constitutional characterization.

51. Union’s Dawn Gateway proposal as advanced on this application does not qualify for federal regulation under either of the two tests referenced by the Supreme Court of Canada in

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<sup>66</sup> Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 139, 1.8-16/

<sup>67</sup> Submissions of Union Gas Limited re: Potential New Issue (August 17, 2009) at p.8, para.21.

*Westcoast*. As determined by the Ontario Divisional Court in considering this Board's 1988 decision, the Supreme Court of Canada's ruling in *Kootenay* remains dispositive of the jurisdictional issue. The St. Clair Line is in the provincial jurisdiction. This application should be dismissed.



## C. PUBLIC INTEREST

52. Alternatively, in the event that this Board determines that the St. Clair Line should be operated in the federal jurisdiction as part of Dawn Gateway, the further issue to be addressed on this application is whether approval of the sale of the St. Clair Line for that purpose is in the public interest considering:

- (a) The negative impacts on landowner interests which will result from the proposed jurisdiction transfer and;
- (b) Union's failure on this application to provide any evidence that it has undertaken appropriate consultation with landowners to address these impacts or to propose reasonable measures to mitigate or compensate landowners satisfactorily for these impacts.

53. As previously referenced, the Board has noted in its Issues Decision on this application that it is this Board and not the NEB which should determine whether the landowner impacts which will result from a change in jurisdiction "are in the public interest of Ontario and Ontario landowners." Although in argument Union now takes the position that "the protection of the interests of landowners is not one of the Board's statutory objectives"<sup>68</sup>, Union has advanced Dawn Gateway as being "in the public interest"<sup>69</sup> and, as noted by the Board in the Issues Decision, at that time Union agreed "that the OEB can consider the implications for landowners of the transfer of the St. Clair Line to an NEB regulated entity."<sup>70</sup>

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<sup>68</sup> Argument in Chief of Union Gas Limited at p. 39, para.106

<sup>69</sup> Union's application, *supra* at p. 2, para. 10; testimony of Bev Wilton, Transcript Vol.2 at p. 56, l.1-6.

<sup>70</sup> Issues Decision and Order, April 6, 2009, *supra* at p. 5.

**Union/Dawn Gateway Easement Rights**

54. Insofar as landowner rights and interests may be affected by the proposed jurisdiction transfer, Union relies in this application on land rights which it acquired in or around 1988 and which are proposed to be assigned to Dawn Gateway LP.<sup>71</sup>

55. The easements rights Union proposes to assign to Dawn Gateway were obtained for the construction and operation of the St. Clair Line in the provincial jurisdiction.<sup>72</sup> From review of Union's 1988 application and the Board's Reasons for Decision in EBLO 226/226A, it is apparent that the additional impacts on landowner interests which would result from the proposed jurisdiction transfer were not addressed in Union's application or considered by the Board in its decision.

56. In its application for the construction and operation of the St. Clair-Bickford line, Union described the form of easement agreement obtained for that purpose as being for "one, and only one" provincially regulated pipeline. It described the major restriction on landowner rights imposed under that agreement as being the construction of buildings or excavations on easement, but otherwise represented to the Board that landowners were "free to farm the easement", and no restrictions were imposed off easement.<sup>73</sup>

57. Those are the easement rights which Union acquired for the construction and operation of the St. Clair Line in the provincial jurisdiction and now proposes to assign to Dawn Gateway<sup>74</sup>.

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<sup>71</sup> Union's Pre-filed Evidence, *supra* at p. 9, para. 47; testimony of Bev Wilton, Transcript Vol.2 at p. 56, l.9-13.

<sup>72</sup> Testimony of Bev Wilton, Transcript Vol.2 at p. 56, l.14-17.

<sup>73</sup> EBLO 226/226A, Pre-filed Evidence, *supra* at p. 30, para. 73.

<sup>74</sup> Testimony of Bev Wilton, Transcript Vol.2 at p. 57, l.5-26.

**Impacts Not Authorized**

58. Similarly, Union described the environmental assessment (“EA”) prepared at that time in support of its 1988 application as having been prepared in accordance with the OEB’s Environmental Guidelines.<sup>75</sup> The purpose of the EA was to identify and assess the potential environmental effects of constructing and operating the St. Clair line as a provincially regulated pipeline and mitigation measures proposed were to minimize the environmental and socio-economic impacts of that provincially regulated pipeline.<sup>76</sup>

59. In the Board’s 1988 Reasons for Decision approving the St. Clair Line, it was the concerns, impacts and mitigation identified in Union’s EA which the Board considered and determined to have been addressed satisfactorily by Union through consultation and negotiation (i.e. those landowner impacts related to the construction and operation of the St. Clair Line as a provincially regulated pipeline)<sup>77</sup>.

60. What are not authorized under Union’s easement agreements proposed to be assigned for Dawn Gateway, not addressed in Union’s 1988 EA and not considered by the Board in its decision approving the St. Clair Line for operation in provincial jurisdiction are any of the impacts on landowner interests which would now result from the proposed change in jurisdiction under Dawn Gateway<sup>78</sup>. These impacts are addressed in Dr. Brinkman’s report and GAPLO’s other pre-filed evidence and include:

- The NEB 30 metre control zone on either side of the easement;

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<sup>75</sup> EBLO 226/226A. Pre-filed Evidence, *supra* at page 26, para. 62.

<sup>76</sup> *Ibid.* at p. 26, para. 63; testimony of Bill Wachsmuth, Transcript Vol.2 at p. 58, 1.8-25.

<sup>77</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 59, 1.3-25.

<sup>78</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 60, 1.22 to p.61, 1.2.

- The 12 inch cultivation restriction;
- Crossing consent requirements and related delays;
- Potential regulatory liability;
- Exposure to abandonment costs and liability; and
- The inability to recover costs of participating in regulatory proceedings.<sup>79</sup>

61. In an interrogatory response, Union identifies impacts which would result from the proposed change in jurisdiction and acknowledges that land use restrictions on and adjacent to easements in the federal jurisdiction are different than those applicable to easements for provincially regulated pipelines.<sup>80</sup> As referenced in the interrogatory response attachment, Union agrees that impacts for landowners may include jurisdictional differences identified by the NEB, including:

- Different crossing restrictions;
- Company consent requirements;
- Possible cultivation restrictions;
- Possible penalties for breach of regulatory orders;
- Non-availability of participant funding<sup>81</sup>.

### **Impacts Not Assessed**

62. None of these impacts which Union agrees would result from the proposed change in jurisdiction were considered by the Board in 1988 when it approved the St. Clair Line as being in

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<sup>79</sup> Exhibit K1.9 GAPLO Pre-filed Evidence, report by George L. Brinkman.

<sup>80</sup> Union response to Board staff interrogatory No. 9, *supra* at page 1.

<sup>81</sup> Testimony of Bev Wilton, Transcript Vol.2 at p. 62, l.10 to p.63, l.24.

the public interest<sup>82</sup>. Union has not provided to the Board on its present application any environmental assessment identifying and assessing those impacts or addressing how those impacts might be mitigated<sup>83</sup>.

63. Union's interrogatory response makes reference to Environmental and Socio-economic Assessment Reports (ESRs) included as part of Dawn Gateway's NEB filing. These environmental assessments do acknowledge that "the change in jurisdiction of the Union St. Clair Line will ... have an effect on landowners/tenants" and that "inconvenience to landowners related to land management practices will be long-term"<sup>84</sup>. However, landowner impacts which would result from a jurisdictional change are simply dismissed as "disruptions to rural lifestyle which are not anticipated to be significant".

64. Apart from a "blanket approval for all standard agricultural facilities" still to be developed, there has been no further assessment by Union as part of this application or by Dawn Gateway as part of the NEB application (or mitigation or compensation proposed) with respect to the impacts on landowners identified by Dr. Brinkman and acknowledged by Union<sup>85</sup>. These impacts which will be suffered by landowners on the existing St. Clair Line (the subject of this application) and the proposed Bickford to Dawn line which would result from the proposed change in jurisdiction have not been resolved and remain outstanding<sup>86</sup>.

65. Further, it appears that Union and Dawn Gateway have no intention of addressing these impacts by agreement with landowners. By notice dated July 9, 2009 delivered to GAPLO-

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<sup>82</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 63, l.25 to p.64, l.7.

<sup>83</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 64, l.17-28.

<sup>84</sup> GAPLO response to Union Interrogatory 4, Attachment 2 (excerpt from St. Clair to Bickford section ESA) and Attachment 3 (excerpt from Bickford to Dawn section ESA).

<sup>85</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 68, l.19 to p.69 l.8.

<sup>86</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 69, l.16-23.

Union (Dawn Gateway)’s Negotiating Committee (following completion of the oral hearing portion of this application), Dawn Gateway has unilaterally terminated negotiations.

66. This Board’s Environmental Guidelines define its expectations with respect to the identification and assessment of environmental and socio-economic impacts on applications related to pipeline facilities which are fundamental to the determination of public interest. If this Board were to apply its own Environmental Guidelines on this application to determine if operation of the St. Clair line as part of Dawn Gateway in the federal jurisdiction continues to be in the public interest, all of the jurisdictional change impacts on landowners on both the existing St. Clair Line and proposed Bickford to Dawn line would have to be identified and assessed and appropriate mitigation or compensation would have to be prescribed.

67. For example:

- In determining public interest, the Board would consider not only economic feasibility but all environmental impacts, including all bio-physical and socio-economic impacts. The Board’s expectation is that the guideline requirements continue to apply even after construction and even where an applicant has existing easement rights<sup>87</sup>;
- With respect to public consultation requirements, Union would be required to consult with affected parties, which certainly includes landowners directly affected by the proposed operation of the pipeline in the federal jurisdiction.<sup>88</sup> Such consultation should include individual interviews to address, for example, any potential restrictions on location of planned buildings or structures<sup>89</sup>;
- With respect to impact identification and assessment, the bio-physical and socio-economic impacts to be identified and assessed include impacts during proposed

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<sup>87</sup> GAPLO Authorities, Tab 6 – OEB Environmental Guidelines, Page 3.

<sup>88</sup> *Ibid.* at p. 17.

<sup>89</sup> *Ibid.* at pp.18-19.

operation of facilities. What is required is an assessment of the net impacts after mitigation/enhancement measures are applied.<sup>90</sup> Those effects and impacts are to be quantified and impacts on land use planning have to be identified.<sup>91</sup> The Board is to have regard to provincial policy statements and, in particular, disruption of farm lands by pipelines is to be minimized; disruption of prime agricultural lands is to be avoided; and impacts on agricultural operations are to be minimized<sup>92</sup>;

- With respect to social impact assessment, Union would be required to recognize “loss of control over their property and living environment experienced by affected landowners” and that the “bulk of social impacts are born by directly affected landowners”<sup>93</sup>;
- To the extent that there are residual effects, including any increase in the area subject to restriction, they must be mitigated or compensated<sup>94</sup>.

### **Determination of Public Interest**

68. On this application, Union has not filed an Environmental Report prepared in accordance with the Board’s Environmental Guidelines; no such assessment has been included as part of Union’s application. To the extent that Union acknowledges that there will be impacts to the interests of existing St. Clair Line landowners, it has not provided as part of this application any identification or assessment of such impacts; it has not carried out individual landowner interviews or identified potential impacts on agricultural facilities which may result from the proposed change in jurisdiction (e.g. control zone); and it certainly has not quantified or valued the economic cost to landowners of these additional impacts, assessed impacts on land use planning, or recognized and addressed the increased loss of control of property and living environment which will result from these additional impacts.

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<sup>90</sup> *Ibid.* at p.24.

<sup>91</sup> *Ibid.* at p.25.

<sup>92</sup> *Ibid.* at pp. 26, 30-31.

<sup>93</sup> *Ibid.* at pp. 36-37.

<sup>94</sup> *Ibid.* at p.39.

69. Union's complete failure on this application to identify and assess what it acknowledges will be additional impacts on landowner interests and to engage in appropriate consultation to develop mitigation/compensation with respect to these impacts leaves this Board without the evidentiary record required to determine whether approval of the sale of the St. Clair Line for transfer to federal jurisdiction as part of Dawn Gateway is in the public interest.

70. In this respect, this case is very similar to the case of *Montana Alberta Tie Ltd.* ("*MATL*") decided last year by the Alberta Utilities Commission. In that case, MATL brought an application to construct and operate a hydro transmission line. Landowners had various concerns about the project including the impact of the facilities on their farming operations and liability risks.

71. The Commission concluded as follows:

“On the basis of the evidence and submissions considered by the Board, the Board concludes that MATL failed to fully and adequately address the impacts that its proposed IPL would likely have on the numerous landowners who convincingly demonstrated that their farming operations and land uses would be materially and adversely affected by the MATL project unless appropriately mitigated. In this proceeding, MATL's evidence was that it could and would mitigate most of the impacts. MATL even suggested possible solutions that it believed would do so. MATL undertook to consult with affected landowners in the course of “engineering” its proposed transmission line and to design, for example, the location, height and type of poles erected and create safe separation between electrical conductors and equipment and pre-existing uses along its preferred route, and, where mitigation is not possible, to compensate landowners for costs and losses they may suffer.

“Accordingly, as fully described in Section 9.4, no permit will be issued by the Board unless and until MATL has undertaken and



completed its engagement with landowners on the basis outlined in this Decision Report.”<sup>95</sup>

72. The Commission refused to approve MATL’s application until the necessary consultation had been undertaken with landowners to address the impacts on their interests. The Commission expressed its expectation as follows:

“The Board expects a proponent to communicate with parties to understand their issues and concerns and then investigate options and implement, where possible, measures to minimize impacts.”<sup>96</sup>

73. With respect to the implications of the consultation failure for the Commission’s determination of public interest, the Commission commented:

“As already noted, the Board’s public interest mandate requires a careful review of the impacts of the MATL project on the lands through which the MATL transmission line would pass and on which the MATL – Alta Link substation would be built. Elsewhere in this decision report, impacts on irrigation, farming, agriculture, human health and safety, the environment, land values, aesthetics, radio, telephone and GPS reception, existing facilities and the electricity market in Alberta have been considered in detail ...

“The Board is satisfied that the MATL project fulfils a need that is of benefit to the citizens and commercial and industrial interests of Alberta. But the Board remains to be satisfied that the mitigation and compensation commitments made by MATL will indeed adequately address the needs and reasonable expectations of landowners who are directly and adversely affected by the proposed MATL project. The Board’s reservation stems from the failure of MATL to determine in some detail how its proposed line will impact lands, farming operations and existing facilities and equipment that are in the way of the proposed transmission line and whether and how conflicts may be resolved.”<sup>97</sup>

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<sup>95</sup> GAPLO Authorities, Tab 7 – *Re Montana Alberta Tie Ltd.*, 2008 CarswellAlta 2229 at paras. 112-113 (Alta. U.C.).

<sup>96</sup> *Ibid.* at para. 189.

<sup>97</sup> *Ibid.* at paras. 314-315.

74. Before the Board would issue the approval requested, it required that MATL satisfy the Board that MATL had “established a process that would engage affected landowners in meaningful discussions and negotiations” including undertaking an ADR process with landowners resulting in either a negotiated resolution of outstanding issues or mediation/binding arbitration of unresolved issues.<sup>98</sup> The Board concluded that only if it was satisfied that mitigation measures to be implemented by MATL would be “substantially successful in meeting the needs and reasonable expectations of those directly and adversely affected by the proposed transmission line, [that] their interests, too, will have been satisfied as well as the public interest as a whole.”<sup>99</sup>

75. If this Board determines that the St. Clair Line should be operated in the federal jurisdiction (GAPLO/CAEPLA’s submissions being, however, that it should not and should continue to operate in the provincial jurisdiction), GAPLO/CAEPLA respectfully requests that the Board should nevertheless dismiss the application because of the complete absence in the evidentiary record of any effort by Union to identify, assess, mitigate or compensate for the impacts on landowner interests which will result from the proposed change in jurisdiction.

76. As provided in its Environmental Guidelines, this Board’s expectation for applicants is the same as the expectation of the Alberta Utility Commission – “a proponent is expected to communicate with parties to understand their issues and concerns and then investigate options and implement where possible measures to minimize impacts”. Union has not filed on this application any ESR or other evidence that fulfils that expectation, leaving this Board in the same position as the Alberta Utilities Commission in *MATL* – “remaining to be satisfied that the

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<sup>98</sup> *Ibid.* at para. 348 and Appendix F- ADR Process Steps

<sup>99</sup> *Ibid.* at para.351.

mitigation and compensation commitments made by [Union] will indeed adequately address the needs and reasonable expectations of landowners who are directly and adversely affected by the proposed project.”

77. With that deficiency in the evidentiary record, this Board cannot conclude (any more than the AUC could conclude in *MATL*) that approval of the sale of the St. Clair line for operation in the federal jurisdiction as part of Dawn Gateway is in the public interest.

78. The application should be dismissed. Alternatively, any approval should be conditional on Union and Dawn Gateway extending to affected landowners the various mitigation measures set out in the pre-filed evidence of GAPLO/CAEPLA derived from other recent pipeline settlements to address landowner impacts. GAPLO/CAEPLA’s proposed conditions to address landowner impacts are listed in Schedule 1 attached to this written argument.

79. In the further alternative, at a minimum, Union should be required to undertake “meaningful discussion and negotiations with landowners” including an ADR process similar to that prescribed in the *MATL* decision to address outstanding landowner concerns.

## D. JURISDICTIONAL CHANGE IMPACTS

80. The additional impacts on landowners' interests which will result from the sale of the Dawn Gateway Line for operation as part of Dawn Gateway in the federal jurisdiction are described in the following sections.

### **Land Use Restrictions under the *NEB Act* and *Pipeline Crossing Regulations***

81. As referenced above, Union represented to the Board in its application for leave to construct the St. Clair Line in 1988 that, under its proposed form of easement agreement, landowners were “free to farm the easement”.<sup>100</sup> Clause 3 of the easement agreement provided that the St. Clair Line would be “laid to such a depth that upon completion of installation it will not obstruct the natural surface run-off from the said lands nor ordinary cultivation of the said lands”.<sup>101</sup> Clause 7 of the agreement reserved to the landowner “the right to fully use and enjoy the said lands”, with some stated exceptions.<sup>102</sup>

82. The form of easement agreement then proposed by Union for agricultural landowners and approved by the Board as required by the *Ontario Energy Board Act* remains the operative agreement for lands owned by the members of GAPLO-Union (Dawn Gateway) today. Union proposes in its present application to assign its easement agreements with GAPLO landowners to Dawn Gateway and argues that the assignment and proposed transfer of the St. Clair Line to the

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<sup>100</sup> EBLO 226/226A, Pre-filed Evidence, *supra* at p. 30, para. 73.

<sup>101</sup> Exhibit K1.9, GAPLO Pre-filed evidence, GAPLO Written Evidence Statement, Attachment 1, Union Gas Pre-filed Evidence in EBLO 226/226A, Schedule 12, Grant of Easement, p. 2 of 4.

<sup>102</sup> *Ibid.*

NEB jurisdiction “would have no impact on the landowners’ rights under the existing easement agreements.”<sup>103</sup>

83. However, under NEB regulation the landowner will no longer be “free to farm the easement” and the rights of Union and Dawn Gateway to control agricultural and other land use activities will not be restricted to the easement they have obtained. Land use restrictions imposed under the *NEB Act* and the associated *Pipeline Crossing Regulations*<sup>104</sup> exceed any restrictions that result from Ontario legislation and regulations and will generate additional delay, risk and cost for landowners.

84. Regulation of agricultural operations on and near provincially regulated pipelines in Ontario essentially mirrors the St. Clair Line easement agreement – landowners are “free to farm the easement”, and restrictions do not extend beyond the limits of the easement.<sup>105</sup> There is no requirement for landowners to obtain permission from a pipeline company before operating farm machinery over a pipeline, and there is no restriction on agricultural practices that do not interfere with the pipeline.

85. Union places emphasis in its argument on sections 9 and 10 of Ontario Regulation 210 made under the Technical Standards and Safety Act, 2000 (the “*TSSA*”), which provide that the location of any pipeline that may be interfered with must be ascertained before breaking ground with mechanical equipment or explosives.<sup>106</sup> Interference with or damage to a pipeline without authority may constitute an offence under the *TSSA*.

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<sup>103</sup> Argument in Chief of Union Gas, para. 74.

<sup>104</sup> GAPLO Brief of Authorities, Tabs 11-13.

<sup>105</sup> Testimony of Bev Wilton, Transcript Vol.2 at p.112, 1.24-27.

<sup>106</sup> Argument in Chief of Union Gas Limited at p. 21, para. 62.

86. However, the applicability of these sections depends on interference or the likelihood of interference with a pipeline. Where activities such as farming operations will not interfere with a pipeline, the Regulation 210 provisions do not apply. Thus, farming activities over and in the vicinity of the St. Clair Line, which are permitted under the terms of the easement agreement, do not trigger the applicability of the regulatory prohibitions cited by Union.

87. Conversely, the *NEB Act* and *Pipeline Crossing Regulations* apply automatically to restrict farming and other land use activities without regard to the circumstances of the activities or to the terms of the easement agreement in place between the pipeline company and the landowner. These restrictions include:

- (a) Section 112(1) of the *NEB Act* provides that, subject to the *Pipeline Crossing Regulations*, no landowner can construct a facility across, on, along or under a pipeline without leave from the NEB;
- (b) Section 112(1) of the *NEB Act* also provides that, subject to the *Pipeline Crossing Regulations*, no landowner can excavate using power-operated equipment or explosives within 30 metres of a pipeline (“pipeline” having been interpreted to include the pipe itself and any surrounding easement or right-of-way) without leave from the NEB;
- (c) In the *Pipeline Crossing Regulations*, the NEB has prescribed conditions under which leave of the Board is not required:
  - (i) For construction or installation of a facility on a pipeline easement or right-of-way or for any activity that disturbs more than 30 cm (roughly 12

inches) of ground on easement or in the 30 metre control zone, leave may be sought by the landowner from the pipeline company. “Facility” includes “any structure...irrigation ditch, drain, [or] drainage system...”;

- (ii) The company then has up to 10 working days to respond to the request for leave;
  - (iii) The landowner must notify the company at least 3 working days in advance of the proposed construction or installation or ground disturbance activity to request a pipeline locate, and in the period preceding the locate the company may prohibit any excavation anywhere on the property of the landowner for up to 3 working days;
  - (iv) Any installation or construction or ground disturbance activity will be subject to any requirements imposed by the company as conditions to its granting of leave;
  - (v) The facility must be maintained in good repair as required by the company and any abandonment and site restoration must be to the satisfaction of the company.
- (d) Section 112(2) provides that landowners may not operate a vehicle or mobile equipment across a pipeline (including the easement or right-of-way) without leave from the pipeline company, unless the vehicle or mobile equipment is being operated within the travelled portion of a highway or public road.

88. These NEB restrictions affect a wide range of agricultural and non-agricultural land use activities that commonly occur along the St. Clair Line that are not currently affected by easement agreement restrictions or Ontario regulations, including:

- (a) The simple operation of farm machinery over the pipeline easement including tractors, combines and trucks, without which modern agricultural operations could not survive<sup>107</sup>;
- (b) Cultivation of the soil or the undertaking of any activity that disturbs the surface of the soil on easement or in the 30 metre control zone, including planting<sup>108</sup>;
- (c) The installation and repair of fencing, drainage and other facilities and buildings in the 30 metre control zone where any excavation is required.

89. Obviously, the operation of farm machinery is fundamental to modern agricultural operations – nearly every aspect of cash crop production involves use of “vehicles or mobile equipment”<sup>109</sup>. Any restriction or delay applied to the use of farm machinery will negatively affect operational efficiency and flexibility for landowners.

90. Cultivation in the fine-textured Brookston clay soils of Lambton County where the St. Clair Line is located commonly includes “deep tillage” of the soil to depths exceeding 30 cm (12 inches), a practice which far pre-dates the St. Clair Line<sup>110</sup>. Farming operations may compress

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<sup>107</sup> Exhibit K1.9, GAPLO Pre-filed evidence, Brinkman Report, Section 3.3, para. 23.

<sup>108</sup> Note that the *Pipeline Crossing Regulations* allow for landowners to obtain leave from the pipeline company as an alternative to obtaining NEB leave only where the proposed excavation would disturb more than 30 cm (disturbances of less than 30 cm are not covered by the regulation). Therefore, technically, NEB leave is required for any excavation to any depth on easement or within the 30 metre control zone, except where the *Pipeline Crossing Regulations* apply.

<sup>109</sup> Exhibit K1.9, GAPLO Pre-filed evidence, GAPLO Evidence Statement, para. 17.

<sup>110</sup> Exhibit K1.9, GAPLO Pre-filed evidence, Brinkman Report, Section 3.2, para. 19.



the soil, and repeated tillage of soil at the same depth will result in the formation of a “hard pan” or compacted layer just below the tillage depth. This hard pan must be broken up using deep tillage practices in order to allow proper drainage of water through the soil and to allow enough room for the expansion of a crop’s root system.<sup>111</sup> Para-tillage may be undertaken at depths of 12 to 16 inches, ripping to 18 inches and sub-soiling to 30 inches.<sup>112</sup>

91. In fact, deep tillage below a depth of 30 cm has been associated with the St. Clair Line since its construction, which took place during inappropriately wet soil conditions. Following construction, chisel-ploughing was used to relieve soil compaction at depths of 20 cm to 40 cm, and in some areas the pipeline easement was sub-soiled to depths of between 60 cm and 70 cm.<sup>113</sup>

92. The repair of fences, drainage tiles and other facilities on and around the pipeline easement is also essential to the farming practices being undertaken along the St. Clair Line. The Union Gas easement agreement provides that for work of this nature on the easement, the landowner must provide five days’ notice to Union, and that Union will consent to the work. Under federal regulation, however, landowners would now require consent for work outside of the easement. Union or Dawn Gateway would have no obligation to consent to the work proposed and would have up to 10 working days to respond to a request for consent.

93. Where livestock is present, fencing must be repaired quickly.<sup>114</sup> Likewise, tile drainage installation and repair, which requires excavation below 30 cm with mechanical equipment, is highly time-sensitive. Drainage problems require immediate attention, especially during spring

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<sup>111</sup> Exhibit K1.9, GAPLO Pre-filed evidence, GAPLO Evidence Statement, para. 13.

<sup>112</sup> *Ibid* at para. 20.

<sup>113</sup> Exhibit K1.7, Union Response to GAPLO Interrogatory 14, Attachment 1, Interim Monitoring Report on Construction and Restoration of the St. Clair to Bickford Pipeline, pp. 18-19.

<sup>114</sup> Exhibit K1.9, GAPLO Pre-filed evidence, Brinkman Report, Section 3.4, para. 26.

planting season when wet soil conditions may delay planting, affect seed germination and result in lower yields and financial loss for farmers.<sup>115</sup>

94. When weekends and holidays are taken into consideration, farmers may have to wait up to 18 calendar days for leave to carry out these farming operations in the 30 metre control zone under the *NEB Act* and *Pipeline Crossing Regulations*.<sup>116</sup> There is no maximum time specification at all that applies to a company responding to a request for leave to operate vehicles or mobile equipment over the pipeline and pipeline easement in Section 112(2) of the *NEB Act*.

95. The temporal delay created under the *NEB Act* and *Pipeline Crossing Regulations* is matched by the geographical impact of the land use restrictions. The St. Clair Line easement is approximately 18 m wide and commonly covers an area of 3 to 4 acres on a 100 acre farm. The control zone that would apply under the Dawn Gateway proposal to each side of the easement would add a total width of 60 m – another 10 to 12 acres on the same farm. The total area that would now be subject to land use restrictions controlled by the pipeline company would be upwards of 15 acres on a 100 acre parcel.<sup>117</sup>

96. In spite of all of this, Union contends that the *NEB Act* is in fact preferable to the Ontario regulations for St. Clair Line landowners because the onus for ensuring safe agricultural operations is placed on the company, not the landowner.<sup>118</sup>

97. The opposite is true. Under Ontario regulation and the easement agreements negotiated with landowners, it is up to the company to ensure that its pipeline does not interfere with

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<sup>115</sup> Exhibit K1.9, GAPLO Pre-filed evidence, GAPLO Evidence Statement, paras. 14-15.

<sup>116</sup> Exhibit K1.9, GAPLO Pre-filed evidence, Brinkman Report, Section 3.4, para. 26.

<sup>117</sup> *Ibid.* at Section 3.2, para. 21.

<sup>118</sup> Argument in Chief of Union Gas Limited, para. 69; Testimony of Gerry Mallette, Transcript Vol.2 at p. 13, 14-14.

agricultural operations. To the extent that it may interfere, it would be for the company to advise the landowner of the potential interference and to ensure that farming activities could continue without interference from the pipeline (“free to farm the easement”).

98. For example, Union’s St. Clair Line is buried at 1 m. Deep tillage will not affect it as evidenced by the deep tillage undertaken by Union Gas following installation of the line. To the extent that the St. Clair Line would interfere with this ordinary cultivation, however, Union would then be in breach of its easement obligations and would have to remedy the situation.<sup>119</sup> The onus is on the pipeline company to maintain its pipelines in accordance with the easement agreement.

99. Under the *NEB Act* and *Pipeline Crossing Regulations*, the assumption is made that landowners cannot carry out what are normal farming activities without interfering with the pipeline – and the onus is on the landowner to seek out permission from the company whenever he or she wants to do something. The company is not obligated to grant permission, and there is no requirement that compensation be paid for any restriction imposed or delay incurred, such as there would be in the event of a breach of the easement agreement.

100. And this assumption that the landowner will interfere with the pipeline extends even beyond the easement to the other lands outside the easement, including the 10 to 12 acre control zone on a 100 acre farm and, in some cases, the entire 100 acre farm.<sup>120</sup>

101. As for regulatory charges, while it is true that landowners might conceivably be charged under the *TSSA* for breaching the provisions of the regulation, the onus is still on the company to

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<sup>119</sup> Exhibit K1.9, GAPLO Pre-filed evidence, GAPLO Written Evidence Statement, Attachment 1, Union Gas Pre-filed Evidence in EBLO 226/226A, Schedule 12, Grant of Easement, p. 2 of 4.

<sup>120</sup> GAPLO Authorities, Tab 12 – *Pipeline Crossing Regulations, Part I*, s.9.

ensure that landowners can farm safely. There is actually a greater risk of penalty under *NEB Act* regulation, where the NEB inspector may issue an order against a landowner at the request of a pipeline company. The fine amounts that can be levied are higher, and the charges will be dealt with under the Criminal Code.<sup>121</sup>

102. Union acknowledges that the St. Clair Line is being operated safely today within the existing 18 m wide easement and without the NEB-regulated control zone.<sup>122</sup> The activities that are taking place adjacent to the St. Clair Line today, including the agricultural operations described above, do not necessitate the 30 m control zone.<sup>123</sup> The Dawn Gateway project is premised on financial motives, not out of any need for additional safety measures.<sup>124</sup>

103. There is certainly no possibility for interference from landowners who don't have the St. Clair easement and whose farms are located across a major roadway separating them from the pipeline easement.<sup>125</sup> Yet these landowners, who will be affected by the same 30 m control zone restrictions, have no easement agreement with Union Gas and have been paid no compensation in respect of the St. Clair Line.<sup>126</sup>

104. Thus, in the NEB jurisdiction, the company acquires rights to prohibit activities on and off easement. This does affect the easement agreement for landowners by diminishing their rights to use their land and by extending the domain of the company outside of the area agreed upon in the St. Clair easement agreement. Perhaps from Union's point of view the easement is unaffected, since its control over the land is increased, but from the landowner point of view the

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<sup>121</sup> Exhibit K1.9, GAPLO Pre-filed evidence, Brinkman Report, Section 3.6.

<sup>122</sup> Testimony of Gerry Mallette, Transcript Vol.2 at p. 108, l.15-25.

<sup>123</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 115, l.24 to p.116, l.3.

<sup>124</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 116, l.4-13.

<sup>125</sup> Testimony of Gerry Mallette, Transcript Vol.2 at p. 121, l.21 to p.122, l.2.

<sup>126</sup> Testimony of Gerry Mallette, Transcript Vol.2 at p. 121, l.8-18.

shift to federal jurisdiction will constitute a loss of the freedom “to farm the easement” and adjacent lands.

### **Increased Risk of Exposure to Abandonment Liabilities and Costs**

105. By interrogatory response, Union has advised that the remaining useful economic life of the St. Clair Line is 10 to 32 years.<sup>127</sup> Upon the expiry of the St. Clair Line’s economic life (as early as 2019), if there is no further economic justification for the pipeline, the St. Clair Line may be abandoned<sup>128</sup>. If abandoned in place without continuing cathodic protection and without the same inspection, maintenance and periodic replacement as when operating, the St. Clair Line can be expected eventually to corrode<sup>129</sup>.

106. The progressive deterioration of the St. Clair Line if abandoned in place creates the risk of post-abandonment liabilities and costs for landowners. Included in GAPLO/CAEPLA’s pre-filed evidence are two discussion papers prepared by the Pipeline Advisory Steering Committee (“PASC”, an industry working group which includes CEPA, of which Spectra and its subsidiaries are members<sup>130</sup>) which identify these potential liabilities and costs related to:

- the potential for ground subsidence which may affect landowners and their agricultural operations;
- the creation of water conduits causing unnatural drainage and material transport; and
- soil, groundwater and surface water contamination.<sup>131</sup>

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<sup>127</sup> Union response to GAPLO interrogatory No. 5(g), supra at p.3.

<sup>128</sup> Testimony of Gerry Mallette, Transcript Vol.2 at p. 72, l.9-12.

<sup>129</sup> Testimony of Gerry Mallette, Transcript Vol.2 at p. 73, l.7-13.

<sup>130</sup> Testimony of Gerry Mallette, Transcript Vol.2 at p. 73, l.27 to p.74 l.6.

<sup>131</sup> Exhibit K1.9, GAPLO Pre-filed Evidence, Report by George L. Brinkman, Attachment 5 – PASC, “Pipeline Abandonment – A Discussion Paper on Technical and Environmental Issues”.

107. The problem for landowners as identified by PASC is that:

“Termination of the right-of-way may result in ownership of the pipeline reverting to the landowners. This is by virtue of the terms of the right-of-way agreement and the fact of abandonment.”<sup>132</sup>

108. In addition to this potential liability for pipeline abandonment and environmental impacts, another major concern for landowners is the impact of abandoned pipelines on future land use and development. PASC concludes:

“In the absence of clear statutory authority, the land developer would be responsible for doing what is necessary in respect of the development” – including pipe removal.<sup>133</sup>

109. Accordingly, if pipelines are not removed at the time of abandonment, there is substantial risk that landowners will be exposed to post-abandonment liabilities and costs. As identified by PASC:

“The legal obligation on the part of a pipeline operator may exceed the life in fact of the operator”; and, as a result,

“Landowners may be liable in the event of loss or injury suffered as a consequence of improper abandonment.”<sup>134</sup>

110. These concerns are of particular significance to landowners in the federal jurisdiction because the NEB has determined that its jurisdiction terminates on abandonment and, accordingly, it has no jurisdiction to address post-abandonment issues. In its *Manito Pipelines Ltd. (MH-1-96)* decision (“*Manito*”), the NEB states:

“Once a pipeline company has obtained an abandonment order, it is open to that company to determine that the real and personal property upon which the abandoned facilities are located are now

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<sup>132</sup> Exhibit K1.9, GAPLO Pre-filed Evidence, Report by George L. Brinkman, Attachment 4 – PASC, “Legal Issues Relating to Pipeline Abandonment: A Discussion Paper”, p. 8.

<sup>133</sup> *Ibid.* at p.9.

<sup>134</sup> *Ibid.* at p.10.

surplus to the requirements of the certificated pipeline. Following that determination, the company is free to dispose of its interest in the property containing the abandoned facilities, as it deems appropriate. Thereafter, the abandoned property ceases to form part of the jurisdictional assets of the pipeline company, as it is held by the company as lands outside the statutory definition of a pipeline and is thereafter subject to all applicable provincial laws. At that point, federal jurisdiction over the surplus pipeline property, including the abandoned line, ceases.”<sup>135</sup>

111. In a recent letter issued “clarifying the nature of the Board’s jurisdiction post-abandonment”, the NEB has confirmed this position. The NEB’s position with respect to termination of its jurisdiction upon coming into effect of an abandonment order is that “the Board’s jurisdiction over a pipeline continues until the coming into effect of the order which authorizes the abandonment of the pipeline”. If conditions are included in the abandonment order, “the order will come into effect when all those conditions have been met and the Board’s jurisdiction will continue until that time.”<sup>136</sup>

112. Should the St. Clair Line be abandoned in the federal jurisdiction, upon satisfaction of any conditions imposed by the NEB, the NEB’s jurisdiction to address post-abandonment issues would terminate. St. Clair Line landowners would then be left in a regulatory vacuum without a regulatory remedy to address post-abandonment issues which may arise including subsidence, drainage, contamination, and land use and development restrictions<sup>137</sup>.

113. On the basis of the NEB’s decision in *Manito* and as reflected in its recent position statement, the NEB will be without jurisdiction to deal with those issues and there is no provincial legislation which would provide landowners with regulatory recourse in connection with a formerly federally regulated pipeline.

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<sup>135</sup> GAPLO Authorities, Tab 10 - *Manito Pipelines Ltd. (MH-1-96)* at p. 21.

<sup>136</sup> Union Gas Interrogatories to GAPLO, Attachment 2, NEB Letter dated February 2, 2009.

<sup>137</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 81, 1.12-21.

114. Conversely, within the provincial jurisdiction, St. Clair Line landowners would continue to have a regulatory remedy to address post-abandonment issues.<sup>138</sup> As identified by Union in an interrogatory response, “provincially abandonment is dealt with by the TSSA”.<sup>139</sup> The Code Adoption Document under the *TSSA* and regulations authorizes the Director to require any company operating under *TSSA* to develop and implement plans and measures to prevent hazards to public safety or adverse affects on environment and property resulting from pipeline abandonment.<sup>140</sup>

115. In argument, Union has suggested that “any regulations or laws that would apply to an abandoned pipeline that was formerly regulated by the OEB would also apply to an abandoned pipeline that was formerly regulated by the NEB”.<sup>141</sup> However, it is only persons “engaged in an activity, use of equipment, process or procedure to which the [TSSA] and this Regulation apply [who] shall comply with the Act and this Regulation.”<sup>142</sup> This compliance obligation expressly includes equipment “disposal”<sup>143</sup>. For the purposes of the Code Adoption Document, “operating companies” over whom the Director has jurisdiction are defined in the regulation to be “an individual, partnership, corporation, joint venture, consortium, public agency or other entity operating a gas or oil pipeline system”<sup>144</sup> Therefore, the Director’s authority to address post-abandonment issues under the Code Adoption Document clearly extends only to companies operating oil and gas pipeline systems under provincial regulation to which the *TSSA* and

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<sup>138</sup> Testimony of Gerry Mallette, Transcript Vol.2 at p.83, l. 7-10.

<sup>139</sup> Exhibit K1.7, Union response to Board Staff Interrogatory No. 9, p. 2.

<sup>140</sup> GAPLO Authorities, Tab 9(a), Code Adoption Document, Section 2(8); testimony of Gerry Mallette, Transcript Vol.2 at p.82, l. 12-21.

<sup>141</sup> Argument in Chief of Union Gas Limited at p.31, para. 82.

<sup>142</sup> Exhibit K2.2, O.Reg. 210/01, s.3(1).

<sup>143</sup> Exhibit K2.2, O.Reg. 210/01, s.3(2).

<sup>144</sup> Exhibit K2.2, O.Reg. 210/01, s. 1(1).



regulations apply. The Director has no authority to address post-abandonment issues with respect to former nationally regulated pipelines to which the *TSSA* and regulations do not apply.

116. As acknowledged by Union, while Ontario's *Environmental Protection Act* provides the Ministry of the Environment with authority to control or prevent discharges or spills of contaminants into the environment, it provides landowners with no regulatory remedy to address post-abandonment subsidence and drainage impacts or land use restrictions and related liabilities and costs resulting from the abandonment of a federally regulated pipeline.<sup>145</sup>

117. Accordingly, for both landowners on the existing St. Clair Line and on the proposed new Bickford to Dawn line, one of the significant impacts of the proposed change in jurisdiction is that, if the pipeline is abandoned in place (possibly as soon as the next 10 years), upon the NEB's abandonment order taking effect, these landowners will have lost their current regulatory remedy to address post-abandonment issues and related liabilities and costs. They will have no regulatory recourse.

118. Different than Union's easement agreement with Ontario Hydro which requires pipeline removal on abandonment unless Hydro determines otherwise<sup>146</sup>, Union's easement agreements with St. Clair Line agricultural landowners which Union proposes to assign to DGLP contain no such contractual right for landowners to require pipeline removal on abandonment.<sup>147</sup> Similarly, the form of easement agreement proposed by Dawn Gateway for Bickford to Dawn landowners

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<sup>145</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 84, l.7-17.

<sup>146</sup> Exhibit K1.9, GAPLO Pre-filed Evidence, GAPLO Written Evidence Statement, Attachment 1 – EBLO 226/226A Pre-filed Evidence Schedule 13, Page 5, Para. 19; testimony of Bev Wilton, Transcript Vol.2 at p. 86, l.9-17.

<sup>147</sup> EBLO 226/226A Pre-filed Evidence, *supra* at Schedule 12; testimony of Bev Wilton, Transcript Vol.2 at p. 86, l.18-26.

contains no contractual obligation on the part of Dawn Gateway to remove the pipeline on abandonment and surrender of the easement.<sup>148</sup>

119. Without a contractual right to require removal of the pipeline on abandonment, if the St. Clair line is abandoned in place in the federal jurisdiction, landowners will have no regulatory recourse to address post-abandonment issues<sup>149</sup>. Whether they may have financial recourse will depend upon Dawn Gateway's (or its assignee's) continued existence and financial status.

120. While the NEB's proposal for the creation of a fund to address future abandonment costs (referenced in Union's argument<sup>150</sup>) may address these risks in some measure, the NEB is proposing to base funding requirements on an assumption of removal of only 20% of large diameter pipelines in agricultural lands and has yet to determine what may be required with respect to perpetual maintenance of the remaining 80% of pipelines abandoned in place. Neither has the NEB provided any direction with respect what authority, if any, will regulate the application of abandonment funds to address post-abandonment issues after termination of the NEB's jurisdiction. Unless and until these issues are satisfactorily addressed, the NEB's adoption of the principle that "landowners will not be liable for costs of pipeline abandonment" is of small comfort to federally regulated landowners.

121. The evidence before the Board on this application clearly establishes that the concern of landowners with respect to their exposure to increased risk for abandonment liabilities and costs which will result from the proposed jurisdiction transfer is a real and substantial concern with

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<sup>148</sup> Exhibit K1.8, Dawn Gateway NEB Application, Appendix G, p.2, paras. 6-8.

<sup>149</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 87, 1.5-23.

<sup>150</sup> Argument in Chief of Union Gas Limited at p. 28, para. 77.

possible significant environmental and socio-economic impacts for landowners. From the cross-examination of Gerry Mallette:

“Mr. Vogel: Would you agree with me that landowners becoming the owner of a corroding, subsiding pipeline would be a major liability concern for landowners?

Mr. Mallette: Yes.<sup>151</sup>

Mr. Vogel: ...’In the absence of clear statutory authority, the land developer would be responsible for doing what is necessary...’ in respect of the development, including removal of the pipe. You would agree with me, similarly, that is a significant concern for landowners with respect to limiting the future use and development of their land and their prospective land value? That is a significant concern?

Mr. Mallette: I guess depending on the situation, it could be significant or insignificant...

Mr. Vogel: Certainly it is a risk that has to be addressed, right?

Mr. Mallette: Absolutely.<sup>152</sup>

Mr. Vogel: ...You agree with me the issues that require addressing in whatever jurisdiction are this potential liability that is talked about here for the landowner. In the absence of a financial recourse or potentially a regulatory recourse, that risk has to be addressed.

Mr. Mallette: Yes.<sup>153</sup>

### **Loss of Availability of Costs Recovery for Regulatory Proceedings**

122. With a shift from provincial to federal regulation of the St. Clair Line, landowners will also lose their access to the cost reimbursement provisions of the *OEB Act*. Union acknowledges that the NEB, except in few limited circumstances, has no authority to award landowners their reasonable costs of participating in regulatory proceedings.<sup>154</sup>

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<sup>151</sup> Testimony of Gerry Mallette, Transcript Vol.2 at p.76, 1.3-6.

<sup>152</sup> Testimony of Gerry Mallette, Transcript Vol.2 at p.77, 1.2-22.

<sup>153</sup> Testimony of Gerry Mallette, Transcript Vol.2 at p.79, 1.14-20.

<sup>154</sup> Argument in Chief of Union Gas Limited, para. 83.

123. Landowners faced with regulatory applications made by pipeline companies cannot effectively participate in those applications to protect their interests unless they have access to a mechanism whereby they can recover their reasonable costs of participation.<sup>155</sup> Regulatory proceedings do not generate revenue for landowners, and they cannot seek to recover their legal, consultant and hearing attendance costs from their customers through regulated or negotiated rates.

124. Union argues that the only landowners affected by an order granting leave to sell the St. Clair Line are landowners who already have the line, and these landowners will only be affected by a small number of NEB proceedings.<sup>156</sup> Yet, both these landowners and landowners with the proposed Bickford to Dawn line are already being affected. Dawn Gateway has filed its application to the NEB for a Certificate of Public Convenience and Necessity, and the NEB will commence a proceeding to determine issues of importance to these landowners such as routing and conditions applicable to the construction and operation of the pipeline in which landowners must participate, if at all, at their own expense.

125. Likewise no costs will be recoverable by landowners if Dawn Gateway applies to the NEB for a Right-of-Entry Order to expropriate any land rights it requires for the project, whether now or in the future. And when Dawn Gateway or its successor decides to abandon the pipeline, landowners will have no ability to recover their costs of participating in an abandonment hearing under s.74 of the *NEB Act*.

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<sup>155</sup> Exhibit K1.9, GAPLO Prefiled Evidence, CAEPLA Evidence Statement, Attachment 2, CAPLA Response to LMCI Stream 2 Discussion Paper.

<sup>156</sup> Argument in Chief of Union Gas Limited, para. 84.

126. While it may be the case that regulatory applications are not made every day, they can be of extreme importance to the landowners whose rights are being affected. That is exactly the circumstance of the present application, where the rights of landowners will be affected by a financially-motivated venture initiated by the pipeline company. Under the provincial regulatory regime in Ontario, landowners such as the members of GAPLO-Union (Dawn Gateway) are able to participate in the company application to represent their interests with an opportunity to recover at least part of their costs from the project proponent.

127. There is one NEB hearing process in which reasonable costs of landowners may be recoverable – the detailed route hearing, in which the Board may determine the best possible detailed route of the pipeline and the most appropriate timing and methods of construction. It should be noted, however, that Dawn Gateway in its application to the NEB for a Certificate applied for an exemption from the provisions that allow a landowner to seek a detailed route hearing. While Dawn Gateway subsequently withdrew that request when the NEB sought additional information regarding the detailed route to be proposed for the pipeline, Dawn Gateway has changed its mind and is once again asking the Board for an exemption from the detailed route process mandated by the *NEB Act*.

128. To the extent that Union acknowledges the landowner concern about costs jurisdiction to be valid, Union addresses the concern through reliance on the NEB's ongoing Land Matters Consultation Initiative (“**LMCI**”). Union notes that the National Energy Board has recently committed to “continuing to work with Natural Resources Canada (NRCan) to identify

opportunities to develop and implement a more complete participant funding program for NEB hearings related to facilities.”<sup>157</sup>

129. Union does not, though, refer to the NEB’s explanation of how it intends to work with NRCAN on the issue of costs. At Section 2.2 of its Stream 2 Actions Table at Appendix 1 to the LMCI Streams 1, 2 and 4 Final Report dated May, 2009, the NEB describes its approach as follows:

“If NRCAN decided to examine this policy area, the NEB would work with NRCAN to assess, and if appropriate, implement any changes.”<sup>158</sup>

130. In other words, the NEB’s commitment to continuing to work with NRCAN as relied upon by Union is nothing more than a wait and see approach, a fact that Union acknowledges.<sup>159</sup> If NRCAN decides unilaterally to address the issue of landowner recovery of costs incurred in regulatory proceedings, then the NEB will work with NRCAN. Otherwise, nothing is going to happen.

131. The NEB’s LMCI process is not a sufficient answer to the concerns of GAPLO-Union (Dawn Gateway) landowners. It will do nothing to facilitate their meaningful participation in the regulatory processes that will determine how their rights will be affected by Union’s proposed venture.

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<sup>157</sup> Exhibit K2.1 – NEB Land Matters Consultation Initiative Streams 1, 2 and 4 Final Report, May 2009, p.4.

<sup>158</sup> *Ibid.* at Appendix 1, page 10.

<sup>159</sup> Testimony of Bill Wachsmuth, Transcript Vol.2 at p. 149, l.17-25.

## **E. Addressing Union’s Failure to Identify and Assess Impacts**

132. Union has neither identified nor assessed these landowner impacts as part of this application and has failed to propose adequate mitigation (apart from a “blanket approval” still to be developed). On that record, this Board cannot determine that approval of the proposed sale of the St. Clair Line for operation in the federal jurisdiction with these landowner impacts (not part of the original St. Clair Line leave to construct or the St. Clair Line easement agreement) is in the public interest. As previously submitted, this application should be dismissed.

133. In the alternative (and again, only if this Board determines that the St. Clair Line should be operated in the federal jurisdiction as part of Dawn Gateway), GAPLO/CAEPLA respectfully submits that any approval granted by the Board should be conditional on Union and Dawn Gateway extending to affected landowners measures that will at least partially mitigate for landowners the negative impacts of the proposed regulation of the Dawn Gateway Line by the National Energy Board.

134. Essentially, landowners should be placed to the extent possible in the same position in the federal jurisdiction as they are in under Ontario regulation. There is no technical impediment to providing this protection for landowners – the St. Clair Line has been and continues to be operated safely within the provincial jurisdiction and in accordance with the Union easement agreement.

### **Land Use Restrictions under the *NEB Act* and *Pipeline Crossing Regulations***

135. With respect to Section 112 of the *NEB Act* and the *Pipeline Crossing Regulations*, Union purports to deal with the concerns of landowners through a “blanket approval” provided at

“Appendix A” to its Argument in Chief. Union says that it is willing to agree to a condition of approval on this application that would require Dawn Gateway to provide this “blanket approval” to all landowners who own land on or within 30 m of the St. Clair Line easement.<sup>160</sup>

136. Affected landowners need more than a “blanket approval” in the form proposed by Union in its argument. First of all, landowners need a commitment that runs with the land and can be registered on title. Second, the commitment must be binding on all successors and assigns of Dawn Gateway. Third, the permissions being granted by the company must be clearly stated and must specifically reference those land use activities which may be restricted by the *NEB Act* and the *Pipeline Crossing Regulations* (and any successor Act or regulation). Otherwise, landowners must be “free to farm the easement” as Union committed to the OEB in 1988 and free to farm the rest of their lands. If at any time landowners’ agricultural practices are restricted, the company must mitigate the impacts of the restriction or compensate the landowner.

137. For example, to address increased easement restrictions which result under NEB regulation, the recent settlement between Enbridge Pipelines Inc. and Manitoba and Saskatchewan landowners (already under federal jurisdiction) affected by Enbridge’s Alberta Clipper and Southern Lights Pipelines:

- (a) “grants permission to the landowner to cross the LSr, Alberta Clipper and all existing pipelines at any time with all agricultural equipment to carry out cultivation of the lands” except that permission is required, *inter alia*, for non-agricultural equipment “if not loaded in accordance with provincial highway standards or in excess of the manufacturers specified load limits” ; and

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<sup>160</sup> Argument in Chief of Union Gas Limited, para. 73.



- (b) “If at any time, Enbridge determines that the landowner cannot cross any pipeline or pipelines with all agricultural equipment Enbridge shall:
  - (i) specify to the landowner the restricted equipment or practice;
  - (ii) where applicable, implement mitigative measures so as to ensure the safe crossing of the landowner’s farming equipment and practices over the pipeline(s); or
  - (iii) with respect to cultivated lands and with the landowner’s agreement, pay compensation for any resulting crop loss or other direct damages.”<sup>161</sup>

138. The Blanket Approval Commitment that is required for St Clair Line landowners (currently under provincial jurisdiction) to address increased land use restrictions under federal jurisdiction must, at a minimum, include the following grants of permission:

- (a) On easement:
  - (i) for all farming activities, including the operation of farm machinery;
  - (ii) for crossing the easement with non-agricultural equipment if loaded in accordance with provincial highway standards or with manufacturer’s specified load limits;
- (b) On all lands outside the easement as may be affected by the *NEB Act* and regulations, for all farming activities, including but not limited to:

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<sup>161</sup> Exhibit K1.9 GAPLO Pre-filed Evidence report by George L. Brinkman, Attachment 6, p.6, par.2.10; Appendix”B”.

- (i) operation of farm machinery
  - (ii) tiling and tile repair, maintenance and abandonment;
  - (iii) fence construction, maintenance and abandonment;
  - (iv) laneway construction, maintenance and abandonment;
  - (v) irrigation ditch construction, maintenance and abandonment;
  - (vi) building construction, maintenance and abandonment;
  - (vii) cultivation, including but not limited to ripping, ploughing, chisel-ploughing, subsoiling, deep tillage and para-tilling;
  - (viii) manure injection;
  - (ix) mechanical excavations other than for tile repair;
  - (x) tree-spading;
  - (xi) stump removal;
- (c) If at any time any such land use activities and agricultural practices are restricted as a result of the construction, operation or regulation of the Dawn Gateway Line, Dawn Gateway shall:
- (i) specify to the landowner the restricted equipment or practice; and
  - (ii) where equipment or practice is restricted:

- (a) implement mitigative measures so as to ensure the safe operation of the landowner's equipment and practices; or
- (b) with respect to cultivated lands and with the landowner's agreement, pay compensation for any resulting crop loss or other direct damages.

### **Increased Risk of Exposure to Abandonment Liabilities and Costs**

139. With respect to abandonment-related liabilities and costs for landowners, GAPLO/CAEPLA respectfully submits that, in the alternative to dismissal of this application, any approval granted by the Board should be conditional on Union and Dawn Gateway extending to affected landowners the same measures to which Union agreed with GAPLO-Union (Strathroy-Lobo) landowners (“GUSL”) or to which Enbridge agreed with Manitoba Pipeline Landowners Association/Saskatchewan Association of Pipeline Landowners. These contractual provisions will mitigate at least in some measure the increased exposure of these landowners to abandonment liabilities and costs.

140. Included in GAPLO's pre-filed evidence is the Settlement Agreement filed with this Board in connection with Union's Strathroy-Lobo looping of the Dawn Trafalgar pipeline in 2006. As part of that settlement, Union agreed to insert in the easement agreement provisions restricting Union's assignment rights and requiring removal of the pipeline on abandonment as follows:

“The Transferee shall not assign this agreement without prior written notice to the Transferor and, despite any such assignment, the Transferee shall remain liable to the Transferor for the performance of its responsibilities and obligations hereunder.”

“As part of the Transferee’s obligation to restore the lands upon surrender of its easement, the Transferee agrees at the option of the Transferor to remove the pipeline from the lands. The Transferee and the Transferor shall surrender the easement and the Transferee shall remove the pipeline at the Transferor’s option where the pipeline has been abandoned.”<sup>162</sup>

141. Although not proposed by Union on this application or Dawn Gateway, Union acknowledges that providing landowners on the St. Clair Line and the proposed Bickford-Dawn line with a contractual right to removal of the pipeline on abandonment will avoid post-abandonment impacts associated with abandonment of pipelines in place.<sup>163</sup>

142. Further, or alternatively, in Enbridge’s 2007 settlement with Manitoba and Saskatchewan landowners on its Southern Lights and Alberta Clipper pipelines, Enbridge agreed that any assignment of its easement rights (unless landowners otherwise agree) must be to a party with an equivalent credit rating or Enbridge remains liable for its abandonment obligations. These obligations require Enbridge, upon pipeline abandonment, to either remove the pipeline or continue to maintain the pipeline, including cathodic protection, and Enbridge cannot surrender its easement obligations without the landowner’s consent.<sup>164</sup>

143. Again, although not proposed by Union on this application or Dawn Gateway, these easement agreement provisions provide some measure of protection for landowners with respect to future liabilities and costs which may arise from post-abandonment issues.<sup>165</sup> As under the GUSL easement agreement, landowners can require removal of the pipeline before consenting to surrender and release of the company’s contractual obligations, and until that time, the company is required to continue to maintain the pipeline.

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<sup>162</sup> Exhibit K1.9 GAPLO Pre-filed Evidence report by George L. Brinkman, Attachment 7, pp. 3, 5.

<sup>163</sup> Testimony of Bev Wilton, Transcript Vol.2 at p.88, l.26 to p.89, l.4; p.90, l.1-7 and l.19-25.

<sup>164</sup> Exhibit K1.9 GAPLO Pre-filed Evidence report by George L. Brinkman, Attachment 6, p.12, 13.

<sup>165</sup> Testimony of Bev Wilton, Transcript Vol. 2 at p. 93, l.5-21 and l.22 to p. 94, l.4; testimony of Bill Wachsmuth, Transcript Vol.2 at p.94 l.26 to p.95, l.15.

144. In fact, in the context of this proceeding in which Union Gas seeks to assign an easement(s) obtained from landowners specifically for the purpose of a provincially-regulated pipeline to Dawn Gateway to be used for a federally-regulated pipeline, a restriction on future assignability that goes beyond the GUSL or Enbridge examples may even be warranted. The Board might consider a condition that the future assignment of the easement agreement by Dawn Gateway or any subsequent assignee require the prior written consent of the landowner.

#### **Loss of Availability of Costs Recovery for Regulatory Proceedings**

145. If Union's application is granted, then in order to maintain for landowners their ability to seek reimbursement of their reasonable costs of regulatory proceedings in the provincial jurisdiction, there must be a requirement that Dawn Gateway and its successors and assigns be responsible for payment of the reasonable costs of landowners incurred in regulatory proceedings before the National Energy Board according to the OEB tariff (as it may exist from time to time).

146. In the event of a dispute between the parties as to the reasonable costs which must be paid, a landowner's claim for costs should be arbitrated before the NEB in accordance with the OEB's Practice Direction on Costs Awards.

#### **Conditions of Approval**

147. Again, this application should be dismissed because Union has neither identified nor assessed additional landowner impacts as part of this application and has failed to propose adequate mitigation. In the alternative, GAPLO/CAEPLA respectfully submits that any approval granted by the Board should be conditional on Union and Dawn Gateway extending to affected

landowners mitigation measures that will at least partially mitigate for landowners the negative impacts of the proposed regulation of the Dawn Gateway Line by the National Energy Board.

148. Moreover, the measures which Dawn Gateway must extend to landowners must be extended to all landowners affected by the proposed Dawn Gateway Line, not just those landowners who own lands along the existing St. Clair Line. Affected landowners include landowners who will not have the Dawn Gateway easement on their lands but whose lands nonetheless fall within the 30 m control zone.

149. Affected landowners also include members of GAPLO-Union (Dawn Gateway) who own lands along the proposed Bickford to Dawn portion of the Dawn Gateway pipeline route. Dawn Gateway's updated filing with the NEB (July 17, 2009) now proposes use of an existing unused Union easement for the new Bickford to Dawn segment of the Dawn Gateway Line. This easement was obtained by Union in connection with its EBLO 244 application to the OEB for a provincially-regulated pipeline. With respect to Board approval of this easement, as with the St. Clair Line easement agreement, Union has represented that "the landowner is free to farm the easement."<sup>166</sup> However, Bickford to Dawn landowners are now in the same position as the St. Clair Line landowners with respect to impacts which will result from the proposed transfer to federal jurisdiction of their existing easements granted in contemplation of provincial regulation.

150. GAPLO/CAEPLA proposes that the mitigation measures proposed above in the alternative should be imposed by way of conditions of approval on this application that require Dawn Gateway to make commitments to the National Energy Board as part of its Certificate application that the measures will be carried out (see Schedule 1). Alternatively, the mitigation

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<sup>166</sup> Union response to Undertaking J2.5, Application RP-1999-0030, p.8-2, para. 7.

measures would form part of contractual commitments to be extended by Dawn Gateway to the affected landowners.

151. In the further alternative, if this application is not dismissed or conditions as set out in Schedule 1 are not imposed to address landowner impacts of the proposed change of jurisdiction, GAPLO/CAEPLA respectfully requests that any approval of the sale of the St. Clair Line at least be made conditional upon Union addressing any landowner impact for which the Board does not impose conditions.

152. Under this alternative proposal, as in the MATL case, no approval of the sale of the St. Clair Line for operation as part of Dawn Gateway in the federal jurisdiction should be issued until Union has established a process satisfactory to the Board to engage landowners in meaningful discussion and negotiations (including ADR mediation/compulsory arbitration) and the Board has been satisfied that Union will provide mitigation or compensation adequate to address these impacts.

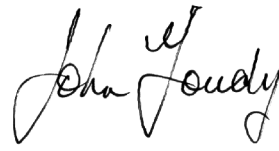
**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**August 21, 2009**



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**Paul G. Vogel**  
**Solicitor for GAPLO/CAEPLA**

A handwritten signature in black ink, reading "John D. Goudy". The signature is written in a cursive style with a large, stylized "J" and "G".

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**John D. Goudy**  
**Solicitor for GAPLO/CAEPLA**



## **SCHEDULE 1 – Proposed Conditions of Approval**

As a condition of approval of the sale of the St. Clair Line to Dawn Gateway by Union, Dawn Gateway shall make the following binding and irrevocable commitments to the National Energy Board as part of its application for a Certificate of Public Convenience and Necessity for the Dawn Gateway Line:

1. Dawn Gateway shall grant permission to all landowners whose lands are subject to an easement for the Dawn Gateway Line or who own land that is within 30 m of the easements used by Dawn Gateway for the following land use activities, without the need for the landowner to make application for permission:
  - a. On easement lands:
    - i. all farming activities, including the operation of farm machinery;
    - ii. crossing the easement with non-agricultural equipment if loaded in accordance with provincial highway standards or with manufacturer's specified load limits;
  - b. On all lands outside the easement as may be affected by the *NEB Act* and regulations, all farming activities, including but not limited to:
    - i. the operation of farm machinery;
    - ii. tiling and tile repair, maintenance and abandonment;
    - iii. fence construction, maintenance and abandonment;
    - iv. laneway construction, maintenance and abandonment;
    - v. irrigation ditch construction, maintenance and abandonment;
    - vi. building construction, maintenance and abandonment;

- vii. cultivation, including but not limited to ripping, ploughing, chisel-ploughing, subsoiling, deep tillage and para-tilling;
    - viii. manure injection;
    - ix. mechanical excavations other than for tile repair;
    - x. tree-spading;
    - xi. stump removal;
  - c. If at any time any such land use activities and agricultural practices are restricted as a result of the construction, operation or regulation of the Dawn Gateway Line, Dawn Gateway shall:
    - i. Specify to the landowner the restricted equipment or practice; and
    - ii. Where equipment or practice is restricted:
      - 1. implement mitigative measures so as to ensure the safe operation of the landowner's equipment and practices; or
      - 2. With respect to cultivated lands and with the landowner's agreement, pay compensation for any resulting crop loss or other direct damages.
- 2. Dawn Gateway shall not assign its easement without prior written notice to the landowner and, despite any such assignment, Dawn Gateway shall remain liable to the

landowner for the performance of its responsibilities and obligations under the easement agreement and as part of its commitments to the National Energy Board.

3. Dawn Gateway shall not surrender its easement without express written consent of the landowner. As part of Dawn Gateway's obligation to restore the lands upon surrender of its easement, Dawn Gateway shall remove the pipeline at the landowner's option where the pipeline has been abandoned.
4. Dawn Gateway shall be responsible for payment to the landowner of the reasonable costs of the landowner incurred in any National Energy Board regulatory proceeding related to the Dawn Gateway Line according to the OEB Tariff (as it may exist from time to time). In the event of a dispute between the parties as to the reasonable costs which must be paid, the landowner's claim for costs shall be arbitrated before the NEB in accordance with the OEB's Practice Direction on Costs Awards.

As a further condition of approval of the sale of the St. Clair Line to Dawn Gateway by Union, Union shall be responsible for the fulfillment of Dawn Gateway's commitments to the National Energy Board in the event of default by Dawn Gateway.